No. 16,275

IN THE

United States Court of Appeals

For the Ninth Circuit

DEAN EJNARD BJORSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on June 6, 1956 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) in that he knowingly refused to report to his Local Board to be given instructions to proceed to a place of employment for the purpose of doing civilian work contrib-

uting to the maintenance of the national health, safety and interest (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 7-8) and was tried by the Honorable Michael J. Roche on August 7, 1958 (Tr. 8-9). Appellant was adjudged guilty (Tr. 9) and on October 15, 1958 was sentenced to a term of one year (Tr. 9-10). Appeal was timely made to this Court from the judgment of conviction (Tr. 11-12).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on May 2, 1950 and gave his date of birth as May 2, 1932 (File 1 and 2). Appellant's Classification Questionnaire was filed with his Local Board on May 12, 1951 (File 5). On page 3 of the Questionnaire, appellant claimed to be a minister of religion in the Jehovah's Witnesses. He further claimed on page 7 that he was conscientiously opposed to participation in war in any form.

On May 28, 1951, appellant was classified 1-A by the Local Board (File 12). The classification of 1-A was appealed (File 27) and appellant's case referred to the Department of Justice for an inquiry and hearing with respect to his conscientious objector claim (File 40-41). The Appeal Board classified appellant 1-A on July 23, 1952 (File 42).

A medical Certificate of Acceptability forwarded to the Local Board, and dated August 15, 1952, indicated that the appellant was found not acceptable for in-

duction as he was sub-standard physically (File 44). Following a personal appearance before the Local Board on September 9, 1952, appellant was classified 4-F (File 48).

The Local Board then received a second medical Certificate of Acceptability dated July 6, 1953, indicating that appellant was found fully acceptable for induction into the armed forces (File 75). On July 14, 1953, appellant was classified 1-A (File 12). On August 3, 1953, the Local Board issued to appellant an Order to Report for Induction, directing that he report to his Local Board on August 14, 1953 for forwarding to an induction station (File 80). A letter addressed to the United States Attorney, dated August 14, 1953, from the induction station, indicated that appellant refused to submit to induction (File 82). Appellant was indicted for refusal to submit to induction, pleaded not guilty and proceeded to trial before the late United States District Judge Edward P. Murphy. Appellant was convicted and on February 19, 1954, was ordered to pay a fine of $2,000.00 and received a two-year suspended sentence (File 99). The Local Board thereafter classified appellant 4-F on April 13, 1954. A letter addressed to the Local Board, dated April 15, 1954, from the United States Attorney, stated that appellant on March 9, 1954, was sentenced to imprisonment for two years on the basis of his refusal to pay the $2,000.00 fine imposed by Judge Murphy (File 103).

On May 24, 1956, the Local Board received a Dependency Questionnaire from appellant indicating

that he had been employed at the American Supply Company, Berkeley, California since July 28, 1955, and was earning $80.00 a week (File 107).

A Request for Determination of Eligibility for Induction was forwarded to the Commanding General of the Sixth Army on June 27, 1956 (File 138). The request indicated that appellant had been confined in the Federal Prison Camp at Tucson, Arizona for a period of fourteen months, and had been placed on parole which terminated April 7, 1956 (File 140). The Commanding General, Sixth Army, Presidio, San Francisco, California recommended to the Adjutant General, Department of the Army, Washington, D.C., approval of the request on June 28, 1956 (File 141), and on July 12, 1956, the Joint Induction Screening Group, Department of the Army, Washington, D.C., approved the aforsaid request for a moral waiver. The Secretary of the Army on July 13, 1956, approved the request for waiver of appellant's prior conviction in a memorandum addressed to the Commanding General, Sixth Army (File 134), and on July 20, 1956, a medical Certificate of Acceptability was issued indicating that appellant was fully acceptable for induction into the armed forces (File 167).

Thereafter on August 21, 1956, appellant was classified 1-A by his Local Board (File 13). It is noted that appellant took no appeal from this classification.

On September 10, 1956, the Local Board received a report from appellant's employer stating that appellant worked an average of 40 hours a week for the American Supply Company, Berkeley, California

(File 171). An Occupational Questionnaire dated September 11, 1956, and received by the Local Board, indicated that appellant according to his own statement at that time, was working 40 hours a week for the American Supply Company of Berkeley, California (File 191).

On September 11, 1956, appellant was classified 1-O by his Local Board (File 13), and on September 21, 1956, appellant appealed the classification claiming to be a minister of religion (File 198). Appellant's case was for the second time referred to the Department of Justice for inquiry and hearing respecting the character and good faith of his conscientious objector claim. On March 22, 1957, T. Oscar Smith, Chief, Conscientious Objector Section, Department of Justice, recommended in a letter addressed to the Appeal Board, that appellant be classified 1-O (File 206). On July 18, 1957, the Appeal Board classified appellant 1-O (File 212).

Appellant in a letter addressed to the Local Board on August 25, 1957, stated that if he were to accept work prescribed by Selective Service, he would be serving two masters, and, therefore, could not select any types of work offered (File 220).

The file of appellant contains a report of an interview with appellant on September 16, 1957, at the Local Board, at which time appellant stated he could not accept any job offered by Selective Service in lieu of induction, although he did admit he was not a pioneer minister and worked 40 hours a week in secular employment (File 227-228).

On October 9, 1957, appellant was ordered to report for civilian work and directed to report to his Local Board on October 21, 1957, to be given instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California (File 237). The file contains a memorandum dated October 22, 1957, stating that appellant did not report to the Local Board as ordered on October 21, 1957, to receive instructions to proceed to the place of employment (File 247).

It was stipulated at the trial that a certified photostatic copy of the Selective Service file of appellant be marked and introduced as Government Exhibit 1 in evidence in place of the original and without calling the Clerk to identify the file (Tr. 18). It was further stipulated that appellant failed to report to his Local Board as directed to receive instructions to proceed to a place for employment (Tr. 18). Appellant offered no evidence nor did he testify in his own defense.

QUESTION INVOLVED.

1. Is a waiver of moral unfitness by other than the armed forces a prerequisite to a registrant's being assigned work of national importance?

ARGUMENT.

I. APPELLANT HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDY.

Appellant cannot raise any infirmity in his classification since he has failed to exhaust his administrative

remedy. *Falbo v. United States,* 320 U.S. 549 (1944). According to this case the registrant must go to the "brink" of induction before he can raise any infirmity in his classification. In the case of a registrant ordered to perform civilian work the court's opinion in *United States v. Sutter,* 127 F. Supp. 109, 117 (S.D. Cal.) is apposite. As the court stated:

> "Reporting to the local board preparatory to departing for the performanace of the work ordered, is the 'brink', Estep v. United States, supra, Williams v. United States, supra, to which the registrant in Class 1-O must come before he may obtain a judicial review of his classification."

In this case, the appellant was directed to report to his Local Board on October 21, 1957 to be given instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California. Appellant did not appear at the Local Board as ordered to receive his instructions and, therefore, is in the same position as a registrant who does not appear at the Induction Station. As the Supreme Court stated in *Falbo v. United States,* supra,

> "If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may

> still be rejected at the induction center and the conscientious objector who is opposed to non-combatant duty may be rejected at the civilian public service camp." (Page 553.)

This is especially so here, where defendant is arguing that there was no proper waiver of his unfitness and that he should have been rejected by the Los Angeles County Director of Charities.

II. APPELLANT CANNOT RAISE THE BASIS FOR DENIAL OF HIS 4-F CLASSIFICATION.

(1) Appellant Failed to Appeal From His 1-A Classification.

Any defect in the refusal of the Selective Service System to classify the appellant 4-F is waived because appellant failed to appeal from this refusal. As the record shows, appellant's proper classification on his release from imprisonment was 4-F. On August 21, 1956, however, appellant was classified 1-A by his Local Board. If there was any error in stripping appellant of his 4-F classification, it occurred when he was classified 1-A and was waived by his failure to appeal. In addition, appellant further made clear this waiver by appealing his 1-O classification on the sole ground that he was a minister of religion. The orderly administration of the Selective Service laws prevents a registrant from bringing any defect in his classification to the notice of the court trying him where no hint of such an infirmity was presented to the Local Boards. Possibly the Local Board, for reasons of its own, would have classified the appellant as

morally unfit. In view of his failure to present this issue within the Selective Service System, he cannot now raise it.

(2) The 4-F Classification on Conviction of a Felony Is Not Created for the Benefit of the Felon.

The whole strain of appellant's argument that he was wrongly ordered to appear for service is a classic example of a man seeking to profit by his own wrong. Appellant would interpret Section 6(m) of the Universal Military Training and Service Act, 50 U.S.C.A. App., Section 456(m), as providing a Congressional benefit to those who have been convicted of felonies. Regardless of the merits of appellant's position on other facets of this matter, it would seem that whatever the intent of Congress in passing that section, it was not a feeling of generosity toward felons. Accordingly, it would seem that the registrant is not in the class of those to be benefited by the statute and, accordingly, cannot raise it. It would be an anomaly, indeed, if a section passed for the purpose of allowing the armed forces to free themselves of undesirables were to be interpreted to allow registrants to escape such service under the claim that they were undesirable.

This was also the holding in the case of *Korte v. United States, infra,* where the court held that:

> "We conclude that Section 6(m) of the Act, [50 U.S.C.A. Appendix, Section 456(m)] is not a direction on the part of Congress to exempt from training and service those persons convicted of felonies, but on the contrary is an injunction

not to defer from training and service those persons who have been convicted of misdemeanors. Where there has been a conviction of a felony, the exemption is permissible but is not required. The IV-F classification permissible for a registrant is not created for his benefit, it is created for the benefit of the armed forces."

III. NO FURTHER WAIVER OF A FELONY CONVICTION IS REQUIRED HERE.

Despite the subdivisions of his argument, appellant advances one real ground for this appeal. That is, that a waiver of a prior felony conviction by the Los Angeles County Director of Charities is necessary here. Appellant contends that the army regulation 10D-1, which applies to the armed forces, must have its counterpart in a civilian charity where a conscientious objector is assigned for civilian work. Much the most important obstacle in appellant's way is the case of *Korte v. United States,* 260 F. 2d 633. The opinion in that case states that:

> "This appeal presents the sole question as to whether a Selective Service registrant who has been previously convicted of a felony, is entitled to a classification in IV-F and exemption from service."

Appellant would have us read this opinion as if it applied to a case where a man was inducted into the Army after a waiver of a 4-F classification. Then he constructs the ingenious argument that where no military service is involved there must be a waiver from

the civilian agency. This argument seems to ignore the fact that *Korte v. United States* involves exactly the same factual situation as here. *Korte,* like the appellant here, was prosecuted, not for failure to submit for induction, but for failure to report for work with the Los Angeles County Department of Charities. The whole reasoning of the court in *Korte* is equally applicable to the instant case. Appellant's argument that the Secretary of the Army is incapable of signing a waiver for all the armed forces is equally applicable to the *Korte* case. Lest it be concluded that this point was completely ignored by the court in *Korte,* we submit that the following quotation is apposite:

> "The military agencies are entrusted with the task of selecting personnel to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him. They may, however, waive the disability and in such instance he may be inducted into the armed forces *or assigned to work of national importance.*" (Emphasis supplied.)

Indeed, appellant's whole reconstruction of the statutory scheme for the deferment of conscientious objectors is faulty. Title 50, U.S.C.A. App., Section 456(j) makes it clear that "in lieu of such induction [the registrant may be ordered] by his Local Board . . . to perform for a period equal [to the period of service] . . . such civilian work contributing to the maintenance of the national health . . . as the Local Board may deem appropriate." It is clear that under this statutory scheme any conscientious objector who

otherwise could be inducted into the armed forces, would be assigned to work of national importance. By requiring an additional waiver from the Los Angeles County Director of Charities, the appellant would have this Court hold that a registrant classified 1-O might otherwise be acceptable for induction into the Army and yet, because of the absence of a waiver from the civilian agency, might escape all service of any kind. Such obviously was not the intent of Congress and to allow such a defense here would be to fly in the face, not only of the *Korte* decision, but of the whole framework provided for the treatment of conscientious objectors.

The judgment of the District Court, therefore, should be affirmed.

Dated, San Francisco, California,
June 15, 1959.

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(Appendix Follows.)

Appendix.

Appendix

STATUTE.

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey

any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to

perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

STATUTE AND REGULATIONS.

Section 6(m) of The Universal Military Training and Service Act of 1948, as amended (50 App. 456m). Moral Standards.

> "No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Selective Service Regulation 1622.44 Class IV-F: Physically, Mentally, or Morally Unfit.

> "In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally un-

acceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation."

Selective Service Regulation 1628.10. Who Will Be Examined.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 3. Functions of Induction Stations.

"The primary functions of induction stations are to—

a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d. Moral Standards (except as provided in par. 27e).

> "Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b. More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47)."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d(1).

> "A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . .".

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10e. Individuals ineligible for induction.

> "Individuals listed below are ineligible for induction."

Administrative Disqualifications

(1)(c) "Registrants who fail to meet the prescribed moral standards indicated in d. above."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 14. Preparation and processing of records.

" . . .

b. DD Form 47. (1) Purpose.—DD Form 47 is the official form for recording the results of the administrative records examination during the registrant's preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System."